Office Supreme Court, U.S.
FILED
JUL 14 1983
ALEXANDER L. STEVAS,
CLERK

83-54

No. .....

In The

Supreme Court of The United States

..... Term, 1983

EMMA F. LOPEZ,

Petitioner,

vs.

THE UNITED STATES of AMERICA

Respondent.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

J. G. HORNBERGER
Counsel for Petitioner

J. G. HORNBERGER
4115 N. Central Expressway
Suite E
Dallas, Texas 75204
(214) 522-8021
Counsel for Petitioner

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS 75208 — (214) 748-6022

TABLE OF CONTENTS

Pages

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2, 3

STATEMENT 3, 4

REASONS FOR GRANTING THE WRIT:

1. Introductory Argument 4, 5
2. The plain language of 18 U.S.C. 1425, as well as its predecessor statutes, fails to include State birth certificates 5-6
3. The legislative history of 18 U.S.C. 1425, as well as its predecessor statutes, fails to evidence a congressional awareness of the statute's claimed scope 6-9
4. The registration of birth certificates has traditionally been regulated by State law 9
5. The application of the statute to the false registration of State birth certificates would render a wide range of conduct violative of federal law 9

CONCLUSION 9-10

CERTIFICATE OF SERVICE 11

APPENDIX A — The Opinion of the Court of Appeals ..... A-1 thru A-16

APPENDIX B — The Opinion of the District Court ..... B-1 thru B-3

APPENDIX C — Count 2 of the Indictment C-1

Table of Authorities

Cases: Pages

Dunn v. United States, 442 U.S. 100 (1979) 10

United States v. Adielizzio, 77 F.2d 841 (2nd Cir. 1935) 7

United States v. Henry, 604 F.2d 908 (5th Cir. 1979) 8

United States v. Rodriguez-Serrate, 534 F.2d 7 (1st Cir. 1976) 8

United States v. Smith, 686 F.2d 234 (5th Cir. 1980) 4

United States v. Vargas, 380 F. Supp. 1162 (E.D. New York, 1974) 9

Williams v. United States, ____ U.S. ____, 102 S.Ct. 3088, 73 L.Ed.2d 767 (1982) 4, 5, 6, 8

CONSTITUTION AND STATUTES:

United States Statutes

18 U.S.C. 1425 ..... 2, 3, 4, 5, 6

18 U.S.C. 911 8

The Nationality Act of 1940 (Act of October 14, 1940, 54 Stat. 1163) 2, 5, 7

The Naturalization Act of 1906 (Act of June 29, 1906, 34 Stat. 596) 2, 3, 5, 6, 7

Vernon's Annotated Texas Constitution and Civil Statutes

Vernon's Ann. Tex. Const., art. 16, sec. 32 ..... 3, 9

Vernon's Ann. Tex. St. art. 4477 (The Sanitary Code of Texas), Rules 34 through 57 (Vital Statistics 3, 9

Vernon's Ann. Tex. Stat.

art. 4477b (1911) 3, 9
art. 4477c (1927) 3, 9
art. 4477c (1979) 3, 9

MISCELLANEOUS:

Cong. Rec., Fifty-Ninth Cong., Sess. 1, pp. 7228-7230 (1906) 7

Cong. Rec., Fifty-Ninth Cong., Sess. 1, p. 3640 (1906) 7

Cong. Rec., Fifty-Ninth Cong., Sess. 1, p. 7043 (1906) 7

40 Cong. Rec. H7037 (daily ed. May 17, 1906) 7

86 Cong. Rec. 11947 (1940) 7, 8

H. Rep. No. 4373, 59th Cong., Sess. 1 (1906) 7

QUESTION PRESENTED

Whether the false registration of a State birth certificate constitutes an offense against the United States under 18 U.S.C. 1425.

No. .....

In The

Supreme Court of The United States

..... Term, 1983

EMMA F. LOPEZ,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

Respondent.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

Petitioner, Emma F. Lopez, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra.) is not yet reported. The opinion of the District Court (App. B, infra.) is reported at 484 F. Supp. 212.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. 1425 provides in pertinent part:

   18 U.S.C. 1425 (Procurement of Citizenship or Naturalization Unlawfully)

   (a) Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary, or other evidence of naturalization or of citizenship; or

   (b) Whoever, whether for himself or another person not entitled thereto, knowingly issues, procures or obtains or applies for or otherwise attempts to procure or obtain naturalization, or citizenship, or a declaration of intention to become a citizen, or a certificate of arrival or any certificate or evidence of naturalization or citizenship, documentary or otherwise, or duplicates or copies of any kind of the foregoing

   Shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948.

2. The Nationality Act of 1940 (Act of October 14, 1940, 54 Stat. 1163) is extremely lengthy and is submitted in the Annex to Petitioner's Petition for a Writ of Certiorari, Section A.

3. The Naturalization Act of 1906 (Act of June 29, 1906,

34 Stat. 596) is extremely lengthy and is submitted in the Annex, Section B.

4. Vernon's Ann. Tex. Const., art. 16, Sec. 32 reads as follows:

"Sec. 32. The legislature may provide by law for the establishment of a Board of Health and Vital Statistics, under such rules and regulations as it may deem proper."

5. Vernon's Ann. Tex. St. Art. 4477 (The Sanitary Code of Texas), Rules 34 through 57 (Vital Statistics) is extremely lengthy and is submitted in the Annex, Section C.

6. Vernon's Ann. Tex. St. art 4477(b)(1979) is lengthy and is submitted in the Annex, Section D.

STATEMENT

The opinion of the court of appeals fully sets forth the facts in this case. Petitioner was a midwife in Laredo, Texas. As part of her occupation, she registered births with the city and state officials. In March, 1979, Leonarda Virgil sought Petitioner's help in obtaining a delayed Texas birth certificate for her son who had actually been born in Mexico. Petitioner executed certain documents with the city secretary's office, with copies to the Texas Bureau of Vital Statistics, falsely stating that the child had been born in Texas. Virgil attempted to use the delayed birth certificate when she tried to enter the United States from Mexico with the child.

Petitioner was indicted on two counts: a conspiracy and a violation of 18 U.S.C. 1425. Pursuant to a plea bargain, the conspiracy court was dismissed and Lopez pled guilty

to Count 2 (App. C, infra.) The district court sentenced Lopez to four (4) years in prison, suspended the sentence, and placed her on five (5) years probation.

Lopez filed a petition for writ of habeus corpus under 28 U.S.C. 2255 with the district court which was denied. After her appeal was perfected and the parties had filed their briefs, the court of appeals directed counsel to file supplemental briefs addressing the impact of *Williams v. United States*, ____ U.S. ____, 102 S. Ct. 3088, 73 L.Ed.2d 767 (1982), and *United States v. Smith*, 686 F2d 234 (5th Cir. 1980). The parties then filed supplemental briefs together with annexes containing the relevant statutes and legislative histories.

On May 19, 1983, the court of appeals affirmed the judgment of the district court.

REASONS FOR GRANTING THE WRIT

1. *Introductory Argument*

The court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this Court. The Court of Appeals stated: "The issue in this case is thus whether a person who has aided an alien in fraudulently obtaining a state birth certificate may be convicted of violating the federal immigration laws, specifically 18 U.S.C. Section 1425. This is apparently a case of first impression in any circuit on this specific question."

In *William v. United States*, ____ U.S. ____, 102 S.Ct. 3088, 73 L.Ed.2d 767 (1982), this Court reiterated the long standing rule that a criminal statute should be strictly

construed. The Court set forth specific guidelines to be followed in determining whether a particular conduct is encompassed by a federal criminal statute:

(1) whether the plain language of the statute includes such conduct;

(2) whether the legislative history fails to evidence a congressional awareness of the statute's claimed scope;

(3) whether its application to the conduct in question would render a wide range of conduct violative of federal law; and

(4) whether the subject matter has been traditionally regulated by state law.

The statute under which Petitioner was convicted, 18 U.S.C. 1425, derives from two major revisions of the immigration laws: the Naturalization Act of 1906 (Act of June 29, 1906, 34 Stat. 596) (Annex, Sec. A) and the Nationality Act of 1940 (Act of October 14, 1940, 54 Stat. 1163) (Annex, Sec. B).

2. *The plain language of 18 U.S.C. 1425, as well as its predecessor statutes, fails to include State birth certificates.*

It is undisputed that birth certificates are not listed in 18 U.S.C. 1425 and its predecessor statutes. Therefore, the statute fails to meet the first test enumerated in *Williams*. In rejecting this contention, the court of appeals stated that "we do not read the statute so narrowly, especially in view of the two methods of obtaining citizenship." Since a person can become a citizen at birth, most notably by being born in the United States, the Court reasoned, "(o)ne need not strain the ordinary and logical meaning

of 'other evidence of citizenship' to find that birth certificates are covered by the language."

However, it was exactly that type of test which was expressly rejected by this Court in *Williams*:

> "While (the government's) broader reading of Section 1014 is plausible, we are not persuaded that it is the preferable or intended one. It 'slights the wording of the statute.' . . . And, when interpreting a criminal statute that does not explicitly reach the conduct in question, we are reluctant to base an expansive reading on inferences drawn from subjective and variable understandings.* (*Footnote: That is particularly true where, as here, it is not immediately clear what 'common understanding' would recognize as the implied representation of the act of depositing one's own check . . . We therefore find 'common understanding' a particularly fragile foundation upon which to base an interpretation of Sec. 1014.)"[1]

3. *The legislative history of 18 U.S.C. 1425, as well as its predecessor statutes, fails to evidence a congressional awareness of the statute's claimed scope.*

Nowhere in the legislative history of the 1906 Act is mentioned any problem with respect to false or fraudulent birth certificates. The sole purpose of the Act was to prevent the frauds which were being committed in naturali-

[1] Equally notable in regard to citizenship at birth is being a natural born child of an American citizen. The voluntary legitimation of a child under Texas law is accomplished by the father executing an affidavit as to paternity. Vernon's Ann. Tex. Stat., Family Code, Sec. 13.22. If an American father executed such a statement of paternity in a Texas legitimation proceeding, falsely swearing that a person born in Mexico was his son, it would seem incredulous that the affiant could be convicted under 18 U.S.C. 1425. Yet, if it is logical to include a State birth certificate within the ambit of the statute, based on birth as a method of citizenship, it is equally logical to include the statement of paternity.

zation proceedings. H. Rep. No. 4373, 59th Cong., 1st Session (1906). Senator Scott addressed the problem of "fraudulent certificates of naturalization" and suggested specific safeguards and remedies to prevent fraud in connection with naturalization proceedings. Cong. Rec. Fifth-Ninth Cong., Sess. 1, pp. 7728-7230 (1906). Representative Bonynge stated that the "evils and the abuses, the crimes and the frauds that have been committed against the naturalization laws of the country constitute the strongest argument that could possibly be advanced for a revision of the laws." Cong. Rec., Fifth-Ninth Cong., Sess. 1, p. 3640 (1906). Representative Hays pointed to the thousands of fraudulent naturalization proceedings. Cong. Rec., Fifth-Ninth Cong., Sess. 1, p. 7043 (1906). No one ever mentioned that false birth certificates were a problem which needed to be addressed or that birth certificates were even being used in naturalization or citizenship proceedings. Also, see *United States v. Adielizzio*, 77 F.2d 841 (2d Cir. 1935).

The Court of Appeals conceded that "the 1906 Act dealt exclusively with naturalization" but then pointed to a statement by Joel Marks, Assistant United States Attorney of New York, to support its holding that Congress intended to encompass birth certificates within the ambit of the 1906 statute. A close examination of that portion of the debates shows that the concern was not with false birth certificates but rather with false representations made to immigration officials. 40 Cong. Rec. H7037 (daily ed. May 17, 1906).

The only purpose of the 1940 Act was to "revise and codify the nationality laws of the United States, . . ." 86

Cong. Rec. 11947 (1970) (statement of Rep. Rees). The legislative history fails to disclose any congressional concern with false or fraudulent birth certificates.

The court of appeals cited *United States v. Henry*, 604 F2d 908 (5th Cir. 1979) and *United States v. Rodriguez-Serrate*, 534 F2d 7 (1st Cir. 1976) in support of its holding that the "documentary evidence of citizenship" described in the 1940 Act included State birth certificates. *Henry* is inapplicable because that case involved a violation of 18 U.S.C. 911 which states: "Whoever falsely represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned not more than three years, or both." It is conceded that the use of a State birth certificate, or any other document, *to support a false representation of citizenship* would constitute a violation of 18 U.S.C. 911.

It is true that *Rodriguez-Serrate* holds that a birth certificate constitutes "documentary evidence of citizenship." That case was decided before *Williams* and the First Circuit based its decision on the fact that "(t)here is ample evidence to indicate that birth certificates are routinely relied by Puerto Rican officials to determine alien or citizen status."[2] However, not only does that test not square with the test which this Court enunciated in *Williams*, it is fundamentally unfair to base an "ordinary and logical" meaning of a statute on the discretionary policy

[2] The court below also pointed out that "(t)he Immigration Office now requires state birth certificates in immigration proceedings wherein a person seeks to establish United States citizenship based on birth in the United States, . . ." The court did not disclose whether such policy was in effect at the time the statute in issue was passed. Presumably the policy can be changed at the discretion of the Immigration Office.

of immigration officials. See *United States v. Vargas*, 380 F.Supp. 116 2 (E. D. New York 1974).

4. ***The registration of birth certificates has traditionally been regulated by State law.***

The Uniform Vital Statistics Act in force in a number of States was in substance adopted in Texas. Vernon's Ann. Tex. Stat., Art. 4477 — Rules 34a through 54a (1911, but amended various times thereafter). The Texas law was enacted as part of the Sanitary Code of Texas pursuant to Article 16, Section 32 of the Texas Constitution.

Since 1911, Texas law has provided penal sanctions for the furnishing of false information pertaining to birth records. Vernon's Ann. Tex. Stat., Art. 4477b (1911); Vernon's Ann. Tex. Stat., Art. 4477c (1927), Vernon's Ann. Tex. Stat., Art. 4477c (1979) (Annex, Section D)

5. ***The application of the statute to the false registration of State birth certificates would render a wide range of conduct violative of federal law.***

It is evident that to encompass this activity within the ambit of the statute would involve a significant intrusion by the national government into an area which has traditionally been regulated by the States.

CONCLUSION

The Court of Appeals stated that "Lopez cannot seriously argue that she was not fully apprised that procuring a state birth certificate for a Mexican alien *to prove that she was an American citizen* was a federal crime." (Emphasis added). However, Lopez never made that claim. Lopez argues that she and other ordinary citizens were not apprised by either the plain language of the

statute or its legislative history that a false registration of a State birth certificate constituted a federal crime.

No citizen should be required to guess at the ordinary and logical meaning of a criminal statute. In describing the "rule of lenity", this Honorable Court has repeatedly held that no individual should be forced to speculate, at peril of indictment, whether his conduct is prohibited; and that to insure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not plainly and unmistakably prescribed. *Dunn v. United States*, 442 U.S. 100 (1979).

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Honorable Court grant her petition for a writ of certiorari, and that upon hearing, this Honorable Court reverse the judgments of the Court of Appeals and the District Court, grant Petitioner her writ of habeas corpus, vacate her conviction, release her from conditions of probation, and grant such further and other relief which this Honorable Court deems just and proper.

Respectfully submitted,

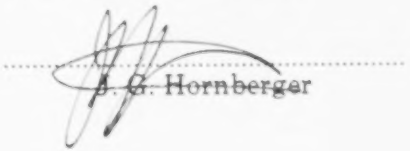
By .....

J. G. HORNBERGER
4115 N. Central Expressway
Suite E
Dallas, Texas 75204
(214) 522-8021

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for a Writ of Certiorari have been sent, by United States Postal Express, to the Solicitor General, Department of Justice, Washington, D.C. 20530 and that one copy has been sent by United States Postal Express, to John M. Potter, Esquire, Assistant United States Attorney, P. O. Box 61129, Houston, Texas 77208-1129.



J. G. Hornberger

Appendix A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Emma F. LOPEZ, Defendant-Appellant.

No. 82-2245.

United States Court of Appeals,
Fifth Circuit.

May 19, 1983.

Appeal from the Uited States District Court for the Southern District of Texas.

Before POLITZ and JOLLY, Circuit Judges, and HUNTER* , District Judge.

E. GRADY JOLLY, Circuit Judge:

Appeallant, Emma F. Lopez, pleaded guilty in February 1980 to a one-count violation of 18 U.S.C. § 1425 which proscribes the knowing procurement of any certificate or other evidence of citizenship for any person not entitled thereto. She was given a suspended sentence and five years' supervised probation. After her probation was revoked in February 1982, she filed a petition for habeas corpus under 28 U.S.C. § 2255 which the district court denied. Lopez has filed a timely appeal. We affirm.

I.

Emma Lopez was a midwife in Laredo, Texas, for thirty-four years. As part of this occupation, she registered births with the city and state officials. In March 1979, Leonarda Vigil, for whom Lopez had previously delivered two other babies, approached Lopez and told her that although she had anticipated that her son, Fran-

cisco, would be born in the United States, he had, in fact, been born in Mexico. Vigil sought Lopez's help in obtaining a delayed Texas birth certificate for her child which Lopez agreed to provide in return for $200.

The $200 was paid over a five-month period, and when the final payment was made, Lopez executed certain documents with the city secretary's office, with copies to the Texas Bureau of Vital Statistics, stating that she had been in attendance as midwife at the birth of an infant in Laredo, Texas. Based on this information, the Texas Bureau of Vital Statistics issued a delayed birth certificate which Vigil used when entering the United States from Mexico with her infant child. The child looked older than the date on the delayed birth certificate, and thus aroused the suspicion of the immigration officer. Upon questioning, Vigil told the officer the whole story, and subsequently called Lopez and asked her what she should do. Lopez told Vigil to stick to her original story that the child had, in fact, been born in Laredo. This call was recorded.[1]

On January 18, 1980, Lopez was indicted on two counts, both a conspiracy and an attempt to procure evidence of citizenship in violation of 18 U.S.C. § 1425. On February 11, 1980, Lopez filed a Motion to Dismiss the indictment in which she alleged that the main purpose of a Texas birth certificate did not relate to naturalization or citizenship proceedings, and therefore 18 U.S.C. § 1425 could not support a conviction for procuring a falsified

[1] These facts were presented by the U.S. Attorney during the defendant's *Boykin* hearing. Both Lopez and her attorney stated that this version of the facts was correct.
We would further note, though not relevant to the issue before us, that the district judge conducted a very thorough *Boykin* hearing.

Texas birth certificate. She thus claimed that the indictment failed to charge a criminal offense. This motion was denied, and on February 20, 1980, Lopez pleaded guilty to the second count of the indictment in return for the government's withdrawal of the first count and its recommendation to the trial judge that she not be incarcerated.

On February 25, 1980, the trial judge held a sentencing hearing at which time he reviewed the report of the probation officers. He noted that Lopez had been under investigation for at least ten years for manipulating birth certificates and that she had previously received a misdemeanor conviction for a similar offense. The judge noted her age, sixty years old, and stated that he did not wish to deprive her of her livelihood, but that he also did not want any more illegal birth certificates. He asked the defendant to work with her attorneys and the probation officers to find a method to serve both ends. Noting that he would later review any proposed plan for modification of the probation, he sentenced Lopez to four years in prison, suspended that sentence, and placed her on five years probation. Two special conditions were attached to her probation: one was that she not practice midwifery in any form, subject to any reasonable plan that she might later submit which would allow her to deliver babies in Laredo but would preclude any further illegal activities, and the second was that the fine be paid as specified.

On May 5, 1080, Lopez filed a Notice of Appeal with this court which she later dismissed after the trial judge granted her motion to modify the probation conditions. This modification allowed her to continue her midwife practice on the condition that each birth be accompanied

by affidavits by Lopez, the mother of the baby, and by a specified disinterested third party, and that these affidavits be delivered to the probation officer within forty-eight hours of the birth.

On January 20, 1980, the judge revoked her probation after finding that she had signed five delayed birth certificates, verifying the earlier birth of a child without meeting the conditions specified in her modified probation. She was sentenced to four years imprisonment, only six months of which she would have to serve in a federal correctional institution, and five years supervised probation to run from the date of her initial sentencing, April 25, 1980.

Lopez filed a writ of habeas corpus directly with this court, pleading that she had not filed with the district court because the district court had previously denied her relief on the same grounds, once when it denied her Motion to Dismiss the indictment, and again during her probation revocation proceedings. On May 26, 1982, this court dismissed the petition, directing Lopez to address her contention to the sentencing court. Lopez subsequently filed her writ of habeas corpus under 28 U.S.C. § 2255 with the district court which denied her petition. She has filed a timely appeal.

II.

On appeal, Lopez contends that her conviction is void because the false registration of births within the State of Texas does not constitute an offense against the United States.[2]

[2] Lopez's first issue is stated as whether probation is a sufficient restraint on liberty to support a habeas corpus action. That question is well settled in her favor. *See, e.g., United States v. Condit*, 621 F.2d 1096, 1098 (10th Cir. 1980); *Coronado v. United States Board of Parole*, 540 F.2d 216, 217 (5th Cir. 1976).

A.

The statute under which Lopez pleaded guilty reads in pertinent part:

> 18 U.S.C. § 1425 (Procurement of Citizenship or Naturalization Unlawfully)
>
> (a) Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship; or
>
> (b) Whoever, whether for himself or another person not entitled thereto, knowingly issues, procures or obtains or applies for or otherwise attempts to procure or obtain naturalization, or citizenship, or a declaration of intention to become a citizen, or a certificate of arrival or any certificate or evidence of naturalization or citizenship, documentary or otherwise, or duplicates or copies of any of the foreging —
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948.

[1, 2] Lopez argues that 18 U.S.C. § 1425 cannot be used to support a conviction for procuring documents unrelated to a naturalization proceeding. Since the births were falsely registered without regard to any citizenship or naturalization proceeding, Lopez contends that the acts fail to fall within the purview of the statute and, therefore, the indictment failed to charge an offense against the United States.[3]

[3] We first note that Lopez pleaded guilty to one count of the indictment. Generally, a guilty plea waives all nonjurisdictional defects in the proceeding against the defendant because the plea admits all elements of the formal charge. A defendant thus has no right to relief on appeal from a plea of guilty unless he or she can show a jurisdictional defect. *See Basrrientos v. United States*, 668 F.2d 838, 842 (5th Cir. 1982); *United States v. Jackson*, 659 F.2d 73, 74 (4th Cir. 1981). The failure of an indictment to allege an offense is a jurisdictional defect and is not waived by a guilty plea. *United States v. Meacham*, 626 F.2d 503, 509-10 (5th Cir. 1980).

The issue in this case is thus whether a person who had aided an alien in fraudulently obtaining a state birth certificate may be convicted of violating the federal immigration laws, specifically 18 U.S.C. §1425. This is apparently a case of first impression in any circuit on this specific question. Since 18 U.S.C. § 1425 is a criminal statute, is must be strictly construed. *United States v. Smith*, 686 F.2d 234, 239 (5th Cir. 1982) (citations omitted).

[3] To interpret § 1425 strictly and correctly, we must look first to the language of the statute. Determining whether fraudulent procurement of a state birth certificate for an alien falls with the ambit of knowingly procuring any certificate or other evidence of naturalization or citizenship for any person not entitled thereto requires an examination and interpretation of § 1425's terms in thier usual or common sense. *Williams v. United States*, ____ U.S. ____, 102 S.Ct. 3088, 3092-93, 73 L.Ed.2d 767 (1982); *United States v. Smith*, 686 F.2d at 239.

The statute in question refers to "any certificate or evidence of citizenship." This and other circuits have recognized that a birth certificate may be used as "evidence of citizenship." *See United States v. Henry*, 604 F.2d 908, 916 (5th Cir. 1979); *United States v. Ghaloub*, 385 F.2d 567, 570 (2d Cir. 1966); *Casares-Moreno v. United States*, 226 F.2d 873, 874 (9th Cir. 1955).

Moreover, the Immigration and Naturalization Service specifically recognizes birth certificates as evidence of citizenship in certain immigration proceedings when United States citizenship is based on birth in the United States. 8 C.F.R. § 204.2 (1982).

Furthermore, the First Circuit has interpreted the

phrase "or other documentary evidence of naturalization or of citizenship" as covering birth certificates. *United States v. Rodriguez-Serrate*, 534 F.2d 7, 11 (1st Cir. 1976). The statute at issue in *Rodriguez-Serrate*, 18 U.S.C. § 1015(c), proscribes the use of certain documentary evidence of citizenship knowing it to be false. It provides in pertinent part:

> 18 U.S.C. † 1015. Naturalization, citizenship or alien registry.
>
> . . . .
>
> (c) Whoever uses or attempts to use any certificate of arrival, declaration of intention, certificate of naturalization, certificate of citizenship or *other documentary evidence of naturalization or of citizenship*, or any duplicate or copy thereof, knowing the same to have been procured by fraud or false evidence or without required appearance or hearing of the applicant in court or otherwise unlawfully obtained; (emphasis added).

In *Rodriguez-Serrate*, the defendant presented a false Puerto Rican birth certificate as evidence of his United States citizenship. In response to the defendant's claim that the false birth certificate which he presented to the immigration official was not the type of documentary evidence of citizenship covered by § 1015(c), the First Circuit noted:

> There is ample evidence to indicate that birth certificates are routinely relied on by Puerto Rican officials to determine alien or citizen status. Consequently, appellant's presentment of the certificate in support of a claim of citizenship when he knew it to be based on false information *clearly places it among those documents whose use Congress meant to bar* through enactment of the statute.

Rodriguez-Serrate, 534 F.2d at 11. (Emphasis added).

A normal, ordinary, and logical reading of the language of § 1425, bolstered by our analysis of legal precedent, convinces us that a birth certificate is such "other evidence of citizenship," the unlawful procurement of which implicates the felony provision of § 1425.

B.

[4] Lopez asserts, however, that *Rodriguez-Serrate* is distinguishable because in that case the alien himself falsely represented himself to be an American citizen by using a false birth certificate, and here the only conduct charged was Lopez's falsely registering births. Lopez relies on *United States v. Adiellizzio*, 77 F.2d 841 (2d Cir. 1935), to support her allegation that to maintain a conviction for procuring documents under 18 U.S.C. § 1425, the documents must be related to naturalization proceedings.

These arguments fail for several reasons. Our discussion of *Rodriguez-Serrate* relates to the interpretation of the words "or other evidence of naturalization or of citizenship" as found in both 18 U.S.C. § 1425, the statute in question, and 18 U.S.C. § 1015(c), the statute construed by the First Circuit. Since we can find no reported cases interpreting those words in 18 U.S.C. § 1425, our resort to another circuit's interpretation of a similar immigration statute containing the same words is helpful to our analysis. *Cf. United States v. Smith*, 686 F.2d at 240.

Secondly, Lopez was charged with wilfully and knowingly procuring documentary evidence of United States citizenship for a Mexican alien, Francisco Manuel Romo Virgil, knowing that he was not entitled thereto, not merely with falsely registering births.

Finally, in regard to Lopez's contention that the docu-

ments involved must be related to naturalization proceedings, we note that *Adielizzio* on which Lopez relies for support, involved 18 U.S.C. § 139 which was repealed in 1948[4] and which is not related to the issue at hand.[5]

C.

We must next review the legislative history to determine whether the scope of the statute *sub judice* has been exceeded by the prosecution. In *United States v. Smith*, this court noted that "[i]t is for Congress to say what shall be a crime and how that crime shall be punished; it is not the prerogative of this Court." 686 F.2d at 239. *Williams v. United States*, requires that we resolve the issue in favor of a defendant if we have doubt that Congress intended for the conduct in question to be covered by the statute. *Williams*, 102 S.Ct. at 3093; *United States v. Smith*, 686 F.2d at 249 n. 25.

Lopez argues that nothing in the legislative history of 18 U.S.C. § 1425 evidences an intention to include state birth certificates as "other evidence of citizenship." The government, as may be expected, argues to the contrary.

The statute at issue derives from two major revisions of the immigration laws, the Naturalization Act of 1906 (Act of June 29, 1906, 34 Stat. 596), and the Nationality Act of 1940 (Act of October 14, 1940, 54 Stat. 1163). A review of

[4] Act of June 25, 1948, ch. 645, 62 Stat. 683 (1948).

[5] In *Adielizzio*, the defendants had obtained fraudulent seamen's certificates. The Second Circuit found that seamen's certificates were designed for the protection of American seamen against impressment into service on British ships, that such certificates were not certificates of citizenship nor were they used in any step of naturalization proceeding, and that the proscription by 18 U.S.C. § 139 against "use of any certificate of citizenship knowing the same to be forged or unlawfully obtained" referred only to certificates of naturalization. *Adielizzio*, 77 F.2d at 843-44.

the legislative debates on the 1906 Naturalization Act reveals that the primary concerns of Congress at the time were the widespread fraud and abuse involved in the naturalization of aliens and a distrust of the state courts' involvement in naturalization proceedings. The practice in many large cities was for thousands of aliens to be naturalized fraudulently immediately prior to election day. There was a nearly uniform belief that the state courts contributed to most of the fraudulent practices, and an effort was made to restrict naturalization proceedings to federal courts. That effort failed, however, primarily out of concern for the convenience of those aliens who legitimately deserved to receive their citizenship. This effort was replaced by a compromise that would restrict jurisdiction to federal courts and to those state courts which had unlimited jurisdiction.

Even though the Fifty-Ninth Congress concentrated on the abuses involved in obtaining naturalization, it was not unaware of the importance of birth certificates in this area. The age of an alien was an important determinant in the procedures necessary to gain naturalization. An alien under the age of eighteen who entered the United States with his parents could be naturalized by the naturalization of his father. An alien over that age was required to fulfill all of the naturalization requirements. 40 Cong.Rec. H3642 (statement of Rep. Bonynge).

Age was also important in the identification of the alien. Most of the fraudulent practices in alien naturalization involved perjury, false impersonation, and use of counterfeit certificates of naturalization. S.Rep. No. 4373, 59th Cong., 1st Sess., 2 (1906). In an effort to stem this

abuse, the new law required an alien to obtain a certificate of registry which would be given to him when he landed in the United States. That certificate, as well as his declaration of intention, would contain a description of the alien, and both were required to be attached to his petition for naturalization. 40 Cong.Rec. H3644 (daily ed. March 9, 1906) (statement of Rep. Bonynge).

In describing the certificate of registry, Joel Marks, Assistant United States Attorney of New York stated:

> With respect to this question of identification by means of a certificate from the Commissioner of Immigration, that certificate will absolutely and correctly give the age of the immigrant, because in all foreign countries except England . . . no man can leave without obtaining a passport, and of course the passport is issued on the certificate of his birth, and certain other papers; so that when he comes to the Port of New York he has in his possession a passport which correctly gives the date of his birth.
>
> Consequently, the first step in his process of becoming a citizen, we have the correct date of his birth; . . . we have on record the correct date, not from the man's memory, not as he and his friends would wish us to have it, but as it actually appears from the certificate of his birth at the place where he was born . . . By means of this certificate, we know exactly the date on which the man was born; and no man can then say that he arrived in the United States under the age of eighteen if such was not the case. That is the object of the certificate, in addition to furnishing the description of the alien, which prevents any possibility of any mistake being made as to his age at the time of arrival.

40 Cong.Rec. H7037 (daily ed. May 17, 1906) (read into the record by Rep. Goulden).

Even though the 1906 Act dealt exclusively with natu-

ralization, it is clear that at that early date, Congress considered a violation of the naturalization laws to be a federal offense; it mistrusted the ability of the state courts to enforce a violation of the naturalization laws; and it considered a birth certificate an important source of information for the immigration certificate.

The first appearance of the current statute's language concerning "evidence of citizenship" appeared in the Nationality Act of 1940.[5] The purpose of the 1940 Act was "to revise and codify the nationality laws of the United States in a comprehensive nationality code . . . to amend

---

[5] The pertinent portions of the 1940 Act which were incorporated into 18 U.S.C. § 1425 are:

Sec. 346. (a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the government of the United States or not —

(2) Knowingly to procure or attempt to procure —

a. The naturalization of any such person, contrary to the provisions of any law; or

b. Documentary *or other evidence of naturalization or of citizenship* of any such person, contrary to the provisions of any law.

(3) To procure or attempt to procure any documentary evidence or *other evidence of naturalization or of citizenship* of any person knowing or having reason to believe that such person is not entitled thereto.

(4) To encourage, advise, aid or assist any person —

. . . . . .

f. Not then entitled or qualified under this Act to obtain such documentary or *other evidence of naturalization of citizenship*, with knowledge that such person was not then so entitled or qualified.

(5) To encourage, aid, advise, or assist any person not entitled to obtain, accept or receive any certificate of arrival, declaration of intention, certificate of citizenship, or *other documentary evidence of naturalization of citizenship*.

a. Knowing the same to have been procured by fraud; or

(7) Knowingly, contrary to the provisions of this Act —

b. To assist in or be a party to the issuance of a certificate of arrival, declaration of intention, certificate of naturalization, certificate of citizenship or any other documentary evidence of naturalization or citizernship.

Act of October 14, 1940, ch. 876, § 346, 54 Stat. 1163, 1164 (emphasis added).

the law with a view to making it more workable and to strengthen it where experience has found it to be weak . . . and to provide for a tightening up as well as a definite enforcement of our nationality laws." 86 Cong.Rec. 11947 (1940) (statement of Rep. Rees).

The codification consisted of five chapters: Chapter I —Definitions; Chapter II — Nationality at Birth; Chapter III — Nationality Through Naturalization; Chapter IV — Loss of Nationality; Chapter V — Miscellaneous. The Act provided two methods by which a person could become a citizen of the United States. The first is citizenship at birth, most notably by being born in the United States and subject to the jurisdiction thereof. Chapter II. The second method is by naturalization under Chapter III of the Act. Citizenship is automatic in the first case; for naturalization, however, the alien must petition for citizenship.

Lopez contends that the 1940 Nationality Act listed the types of documentary evidence of citizenship to which the statute was directed* and that there is no mention of state birth certificates in naturalization proceedings. We do not

* The penal provisions of the 1940 Act were found in section 346. Lopez cites portions of two of the thirty-four paragraphs therefrom as dispositive of the "documentary evidence of citizenship" issue. The first, § 346(5) was included in the current version of 18 U.S.C. § 1425. The second, § 346(9) was not. The two paragraphs read in pertinent part:

Sec. 346. (a) It is hereby made a felony . . . . . .

(5) To encourage, aid, advise, or assist any person not entitled thereto to obtain, accept, or receive any certificate of arrival, declaration of intention, certificate of citizenship, or other documentary evidence of naturalization or citizenship.

b. Knowing the same to have been procured by the use or means of any false name or false statement given or made with the intent to procure the issuance of such certificate of arrival, declaration of intention, certificate of naturalization, or certificate of citizenship,

read the statute so narrowly, especially in view of the two methods of obtaining citizenship. Moreover, had Congress intended to list every document covered by the Act, it would not have been necessary to add the phrase "other evidence of citizenship." Finally, both this court and the First Circuit have held that birth certificates are evidence of citizenship under the penalty provisions of the 1940 Act.

The penal provisions of the 1940 Act found in section 346 made each of thirty-four separate acts a felony violation of the nationality laws. Each separate act was placed in a separate paragraph under section 346(a). Five of those paragraphs were consolidated into 18 U.S.C. § 1425.* Another of the thirty-four violations* formed the basis of 18 U.S.C. § 1015, the statute at issue in *Rodriguez-Serrate* wherein the First Circuit found that birth certificates were "other documentary evidence of citizenship" included in the Act. *Rodriguez-Serrate*, 534 F.2d at 11. *See supra* part II A. Finally, an earlier panel of this court, in

footnote 7 continued
or other documentary evidence of citizenship, or . . . .

(9) Falsely to make, forge, or counterfeit any oath, notice, affidavit, certificate of arrival, declaration of intention, certificate of narturalization, certificate or citizenship, or any other documentary evidence of naturalization or of citizenship, or any order, record, signature, or other instrument, paper, or proceedings, required or authorized by any law relating to naturalization or citizenship.

* 18 U.S.C. § 1425 derived from a consolidation of section 346(a), paras. 2-5 and para. 7. *See supra* note 6.

* 18 U.S.C. § 1015(c) was based on section 346(a)(16) which reads: [it shall be a felony for any person]

(16) To use or attempt to use any certificate of arrival, declaration of intention, certificate of naturalization, certificate of citizenship, or other documentary evidence of naturalization or of citizenship heretofore or which may hereafter be issued or granted, knowing the same to be forged, counterfeited, or antedated, or to have been procured by fraud or by false evidence, or without appearance or hearing of the applicant in court where such appearance or hearing are required, or otherwise unlawfully obtained.

interpreting another portion of the penalty provisions of the 1940 Act[10] hesitated not at all to find that the "presentation of a false birth certificate by an alien as evidence of asserted citizenship would constitute a violation of [18 U.S.C. § 911]." *United States v. Henry*, 604 F.2d 908, 916 (5th Cir. 1979).

In view of the legislative history and the earlier interpretations of the penal provisions of the 1940 Act, we conclude that a birth certificate is such "other evidence of citizenship" and that its fraudulent procurement as proof of United States citizenship for an alien is proscribed by 18 U.S.C. § 1425. In other words, the scope of the statute has not been exceeded by this prosecution.

D.

Lopez finally contends that the registration of birth certificates has always been an area of state regulation in Texas, and that to apply § 1425 to the fraudulent registration of birth certificates would render a wide range of conduct related to other documents traditionally regulated by the state, violative of federal law. In *Williams v. United States* the Court stated:

> Given this background — a statute that is not unambiguous in its terms and that if applied here would render a wide range of conduct violative of federal law, a legislative history that fails to evidence congressional awareness of the statute's claimed scope, and a subject matter that traditionally has been regulated by the state — we believe that a narrow interpretation of [the statute] would be consistent with our

[10] Sec. 346(a)(18) reads:

> [It shall be a felony for any person]
> (18) Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States.

usual approach to the construction of criminal statutes.

Williams, 102 S.Ct. at 3095.

Lopez argues that this language of *Williams* requires that we read the immigration laws as excluding birth certificates from "other evidence of citizenship." The *Williams* Court, however, continued: "The rule of lenity does not give courts license to disregard otherwise applicable enactments." *Williams*, 102 S.Ct. at 3095.

Unlike *Williams*, we do not have an ambiguous statute. One need not strain the ordinary and logical meaning of "other evidence of citizenship" to find that birth certificates are covered by the language. Indeed, all previous courts which have considered the question have so held.

[5] Moreover, the legislative history of § 1425 does not fail to evidence a recognition that birth certificates would be used to provide important information leading to citizenship. The Immigration Office now requires state birth certificates in immigration proceedings wherein a person seeks to establish United States citizenship based on birth in the United States, and although the registration of state birth certificates is traditionally regulated by state law, a violation of the immigration laws has long been considered a federal offense. Moreover, the mere fact that a state criminal statute covers certain activities does not preclude the congress from making the same activities a federal crime.

Finally, Lopez cannot seriously argue that she was not fully apprised that procuring a state birth certificate for a Mexican alien to prove that he was not an American citizen was a federal crime. She was not indicted merely for falsely registering state birth certificates; her crime derived from attempting to procure evidence of American citizenship for a Mexican alien, knowing that he was not entitled thereto. This

conduct comfortably falls within the proscribed activities of 18 U.S.C. § 1425.

Having reviewed the statute in the light of both *Williams v. United States* and *United States v. Smith*, we conclude that "other evidence of citizenship" found in 18 U.S.C. § 1425 covers birth certificates and that the activities for which Lopez was indicted were well within the scope of the statute. We thus affirm the district court's denial of the writ of habeas corpus.

AFFIRMED.

Appendix B

484 FEDERAL SUPPLEMENT

UNITED STATES of America

v.

Emma F. LOPEZ.

Crim. No. L-80-10.

United States District Court,
S. D. Texas,
Laredo Division

Feb. 15, 1980.

ORDER

The Defendant, Emma F. Lopez, was indicted for conspiracy to procure a certificate of American citizenship for a person not entitled to one as well as the underlying substantive offense. 18 U.S.C. §§371, 1425 (1976). The Defendant has moved to dismiss the indictment apparently on the ground that the document which forms the basis of the indictment, namely a Texas birth certificate, is not a "certificate or evidence of . . . citizenship" as that term is used in the statute. *Id.* § 1425. Although the Defendant has cited no cases in support of her position, she is perhaps relying on cases interpreting section 1546, which is also contained in Title 18 of the United States Code. *See generally United States v. Campos-Serrano*, 404 U.S. 293 (1971); *United States v. Vargas*, 380 F.Supp. 1162 (E.D. N.Y. 1974). In a recent case, this Court dismissed an indictment under section 1546 and held that possession of a Texas Delayed Birth Certificate could not form the basis for a conviction under that statute since it was not an entry document issued by the United States.

United States v. Elizondo, No. L-79-269 (S.D. Tex. Jan 22, 1980). The decision in that case, however, was limited to violations of section 1546, which, by its terms, proscribes possession of "document[s] required for entry into the United States . . ." 18 U.S.C. § 1546 (1976). The statute under which the Defendant is charged is not so limited.

The only question which this Court must then address is whether a Texas birth certificate is a "certificate or evidence of . . . citizenship." *Id.* § 1425. This Court has been unable to locate any cases construing this term within the context of section 1425. However, the same term is also employed in 18 U.S.C. § 1015(c), which proscribes the use of certain documentary evidence of citizenship knowing it to be false. *Se id.* § 1015(c). A federal court, interpreting that statute, has held that a Puerto Rican birth certificate was "the type of documentary evidence of citizenship covered by §1015(c)." *United States v. Rodriguez Serrate*, 534 F.2d 7, 11 (1st Cir. 1976).

Moreover, it must be noted that Section 1425 refers to "any certificate *or evidence* of . . . citizenship" and the indictment in this case speaks of "documentary evidence of citizenship". Even if a Texas birth certificate might not be a "certificate of citizenship", the Court believes that it would unquestionably be "evidence of citizenship". *See generally Casares-Moreno v. United States*, 226 F.2d 873, 875 (9th Cir. 1955); *Toi v. Brownwell*, 219 F.2d 642, 644 (9th Cir. 1955); *Liacakos v. Kennedy*, 195 F.Supp. 630, 6 32 (D.D.C. 1961).

A violation of section 1425 having been properly alleged, the Defendant's Motion to Dismiss the Indictment is hereby DENIED.

DONE this 14th day of February, 1980, at Laredo, Texas.

/s/ George P. Kagen
U. S. District Judge

Appendix C

UNITED STATES of America

v.

Emma F. LOPEZ.

Crim. No. L-80-10.

United States District Court,
S. D. Texas,
Laredo Division

COUNT 2

That on or about October 22, 1979, within the Laredo Division of the Southern District of Texas, and within the jurisdiction of this Court, EMMA F. LOPEZ did wilfully and knowingly procure, or attempt to procure, contrary to law, documentary evidence of citizenship of a certain alien named Francisco Manuel Romo-Vigil, a citizen of the Republic of Mexico, knowing said person was not entitled thereto, by causing his birth certificate to be registered in the name of Francisco Manuel Romo, Jr. as having occurred or being born on October 14, 1979 in Laredo, Texas; defendant well knowing that the said Francisco Manuel Romo-Vigil was in truth and fact born in the Republic of Mexico.

(Violation: Title 18, United States Code, Section 1425.)